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No. 86-885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOSTON AND MAINE CORPORATION,
Petitioner,

v.

R.M. LENFEST, JR., *et al.*,
Respondents.

MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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December 30, 1986

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The National Railway Labor Conference hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*, in support of Boston and Maine Corporation's petition for a writ of certiorari.*

The National Railway Labor Conference ("NRLC" or "Conference") is a multi-employer representative of virtually all of the Class I railroads in the country. The

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* Pursuant to this Court's Rule 36(1), a letter of consent from petitioner to the filing of the attached brief has been filed with the Clerk of this Court. *Amicus* was unable to obtain the respondents' consent to the filing of its brief, however.

Conference represents its members for purposes of national collective bargaining with unions representing railway employees, under the Railway Labor Act, and for purposes of other labor-management relations matters of concern to railroads generally. In addition, the Conference serves as a clearinghouse for labor relations information and advises and assists its member railroads in connection with the rules and procedures established by the Railway Labor Act for the resolution of disputes arising out of workplace grievances or the interpretation or application of collective bargaining agreements.

The Conference requests that the Court grant the petition for a writ of certiorari in this case and respectfully submits that its statement in support of the petition will assist the Court by more fully apprising it of the importance of the issues presented. The Conference's presentation also will more fully inform the Court of the fundamental distortion in labor relations in the railroad industry that would be occasioned if the decision of the Court of Appeals in this case were left standing. For these reasons, the Conference seeks leave to file the accompanying brief as *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS WILL FUNDAMENTALLY DISTORT LABOR RELATIONS IN THE RAILROAD INDUSTRY BY ENCOURAGING STRIKES AND WILL UNDERMINE THE RAILWAY LABOR ACT.

In essence, the decision of the Court of Appeals is an invitation to unions to engage in strike and picketing activity. Under section 212 of the Federal Railroad Safety Act, on which the Court of Appeals relied, an employee may not be discharged or otherwise subjected to discrimination "for refusing to work when confronted

by a hazardous condition related to the performance of the employee's duties," *if* the refusal is made in good faith, no reasonable alternative to refusing to work is available, the situation is objectively urgent and of an emergency nature, and the employer has been notified, where possible, of the employee's perception of the danger and his intention not to perform further work unless the condition is corrected. 45 U.S.C. § 441(b)(1)(A)-(C).[1] The Court of Appeals held that the strike in this case was protected under section 212 on the basis of the strikers' unproven assertion that safety was involved, and that the district court lacked jurisdiction to determine whether the conditions stated in the statute for refusing to work in fact were met. Indeed, the district court had found that one of these conditions—notice to the employer of the allegedly hazardous condition—had not been satisfied in this case. Under the Court of Ap-

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[1] Section 441(b)(1) provides in relevant part:

"(1) A common carrier by railroad engaged in interstate or foreign commerce may not discharge or in any manner discriminate against any employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if—

(A) the refusal is made in good faith and no reasonable alternative to such refusal is available to the employee;

(B) the hazardous condition is of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that—

(i) the condition presents an imminent danger of death or serious injury; and

(ii) there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to the regular statutory channels; and

(C) the employee, where possible, has notified his employer of his apprehension of such hazardous condition and of his intention not to perform further work unless such condition is corrected immediately."

peals' ruling, however, the union is given *carte blanche* to strike, and the railroad will have no remedy even if it later turns out that the strikers' safety claims are wholly baseless, that the strike was for reasons completely unrelated to safety (or for no reason at all), and that the strike is clearly unlawful under the Railway Labor Act. Thus, under the decision below, there is no check on unlawful strike activity by unions, and the decision therefore is an outright invitation to unions to engage in such activity with impunity.

The Court of Appeals' decision obviously will have an enormously detrimental impact on the railroad industry, the nation's commerce which it serves, and the public which depends on rail service for daily transportation needs. The commuters and shippers of Boston felt this impact all too painfully on November 4, 1986 (the day of the strike in this case), when the Boston and Maine was shut down and approximately 25,000 Boston area residents who rely on its commuter rail service were left stranded and either could not get to work at all or had to find alternate means of transportation. The Court of Appeals' decision fundamentally undercuts the national policy, embodied in the Railway Labor Act, of preserving essential transportation service and avoiding disruptions of that service arising from labor disputes. See pp. 4-6, *infra*.

The Court of Appeals held that the union's strike was lawful on the ground that it constituted protected activity under section 212 of the Federal Railroad Safety Act. But that holding—that strikes and picketing, as opposed to a refusal to work by affected individuals, are so protected—is flatly contrary to what Congress intended in enacting the statute. As petitioner's brief demonstrates (at pp. 12-14), the legislative history of section 212 shows that Congress' narrow focus was on the predicament of the employee (or employees, as long as they were directly affected by the allegedly hazardous condition), who without the leg-

islation would have to choose "between their lives or their livelihoods." H.R. Rep. No. 96-1025, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 3830, 3832. The original version of the bill that became section 212 would have permitted an employee, "either individually *or in concert with other employees*, to stop working" in order to enforce a demand to be reassigned if he believed his working conditions were unsafe. H.R. 6497 at 3-4, 96th Cong., 2d Sess. (1980) (emphasis added). This authorization for employees to act "in concert with other employees" was deleted from the bill as reported by the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 96-1025, *supra*, at 4, after the Subcommittee on Transportation and Commerce heard testimony from the railroad industry that the Railway Labor Act "doesn't permit strikes except after the most extraordinary exhaustion of circumstances," and that the provision in the proposed legislation allowing employees to act "in concert with other employees" would "give each employee who is dissatisfied with safety conditions the right to back up his unsupported judgment with the block-buster weapon of a strike." *Railroad Safety: Hearing Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 173, 104 (1980) (statement of William H. Dempsey, President, American Association of Railroads). The decision of the Court of Appeals puts the deleted provision back into the statute, contrary to Congress' intent.

The Court of Appeals' decision also undermines Congress' intent, embodied in the Railway Labor Act, to prevent strikes in this essential industry. The statute itself declares the prevention of strikes to be its first-stated purpose, 45 U.S.C. § 151a(1), and it has long been recognized by this Court that "the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R.R.* v.

Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 565 (1930). This dominant concern of Congress is also borne out by the legislative history of the statute, where it was noted during the debates in the House that "[e]verybody recognizes the absolute importance of the smooth and continued functioning of the railway transportation system." 67 Cong. Rec. 4568 (1926) (remarks of Rep. Merritt). Thus, as one of the union spokesmen who participated in drafting the Act stated, the Railway Labor Act "provides a machinery to promote peace, not a manual of war." *Hearings on H.R. 7180*, 69th Cong., 1st Sess. 191 (1926) (statement of D.B. Robertson, Brotherhood of Locomotive Firemen & Enginemen).

To this end, the Railway Labor Act prescribes detailed procedures for the resolution of "all disputes concerning rates of pay, rules, or working conditions." 45 U.S.C. § 151a(4). These include both "major" disputes—over the formation of or proposed changes in collective bargaining agreements—and "minor" disputes—comprised of grievances, disputes concerning the interpretation or application of existing collective bargaining agreements, and so-called "omitted" cases which arise out of "some incident of the employment relation." *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Strikes over major disputes can occur only after procedures requiring negotiations that are "purposely long and drawn out" in the hope that major disputes will be resolved without interruption of commerce. *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 149 (1969). And strikes over minor disputes are not permitted at all: Such disputes are to be decided exclusively by adjustment boards established under the statute, whose decisions are binding, see 45 U.S.C. § 153; and it has long been settled that strikes over or in connection with minor disputes are unlawful and may be enjoined. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). As was recognized both by the district court in this case

and by the Court of Appeals for the Fifth Circuit in *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298, 300 (5th Cir. 1965), a claim by a railroad union that a carrier has failed to maintain safe working conditions presents a minor dispute, and a strike over such a claim is unlawful.

It is absolutely clear that Congress did not intend the Federal Railroad Safety Act to change these well-settled rules under the Railway Labor Act, to allow strikes like the one involved in this case without arbitration, or negotiation, or even any prior warning, on the unsupported claim of a union official that safety is involved. Since repeal by implication is disfavored, see, *e.g.*, *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981), a partial repeal of the Railway Labor Act's procedures for dealing with minor disputes should not be inferred, especially where Congress has made its purposes clear and indeed has incorporated the dispute resolution procedures of the earlier statute. See 45 U.S.C. § 441(c).[2] Rather, as this Court often has noted, the two statutes must be read "to give effect to each if [the Court] can do so while preserving their sense and purpose." *Watt* v. *Alaska*, *supra*, citing *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940). The decision of the Court of Appeals in this case does not heed this settled rule of statutory construction.

Moreover, the Court of Appeals' further holding—that the district court lacked jurisdiction to determine whether

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[2] The Court of Appeals' decision does not even make an effort to accommodate the Federal Railroad Safety Act to the Railway Labor Act, insofar as it does not even allow a court to determine whether the conditions for invoking § 212 of the Railroad Safety Act have been met. Rather, as petitioner notes (Petn. at 17-18), under the Court of Appeals' decision, a union's *bare* assertion that a strike has been called over a safety issue will suffice to legalize the strike, even if a court might conclude that the safety claims are wholly frivolous or that the strike is not really over safety issues at all. See pp. 6-8, *infra*.

the statutory preconditions to the existence of a "dispute" within the scope of section 212 have been met—directly conflicts with controlling rulings of this Court and numerous Courts of Appeals that threshold issues of arbitrability are for the courts, not arbitrators, to decide. The court below held that a bare assertion by a union as to the purpose of the strike suffices to oust the district court of jurisdiction to determine whether the statutory requirements have been met. As petitioner has shown (Petn. at 18-19), this holding conflicts directly with holdings of all the Courts of Appeals that have considered the question, that the federal courts have jurisdiction to decide whether a dispute is arbitrable under section 3 of the Railway Labor Act (made applicable here by the Federal Railroad Safety Act),[3] and to reject a claim of arbitrability where the substantive position of the party asserting that claim is "obviously insubstantial." *E.g.*, *Southern Ry.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967). The decision also conflicts with decisions of this Court under the National Labor Relations Act that the arbitrability of labor disputes is for the courts to decide. See *AT&T Technologies, Inc.* v. *Communications Workers*, 106 S. Ct. 1415, 1418 (1986); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-47 (1964); *United Steelworkers* v. *Warrior Gulf & Navigation Co.*, 363 U.S. 574, 582 (1960). Thus, it is important for this Court to review the Court of

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[3] Section 441(c) provides:

"(c) *Resolution of disputes*

(1) Any dispute, grievance, or claim arising under this section shall be subject to resolution in accordance with the procedures set forth in section 153 of this title.

(2) In the case of any violation of subsection (a) or (b) of this section, the Adjustment Board (or any division or delegate thereof) or any other board of adjustment created under section 153 of this title shall, where appropriate, award backpay to the aggrieved employee and order such employee reinstated to his position."

Appeals' decision on this point, so that, if strikes are to to be protected under section 212 of the Railroad Safety Act, at least the provision should be construed to allow the federal courts to enjoin strikes purportedly based on that provision when the union's position is obviously insubstantial or frivolous.

The issues presented by the petition are of vital importance in the railroad industry. During the sixty years since passage of the Railway Labor Act, labor and management in that industry have functioned under that statute, developing settled practices and expectations for the resolution of major and minor disputes and largely maintaining the peaceful processes of dispute resolution that the statute was enacted to ensure. If a union may circumvent the rules and restrictions of the Railway Labor Act merely by invoking the talisman of "safety," and if the federal courts may not look to see whether the union's claims even arguably fall within the purview of the Federal Railroad Safety Act, then the Railway Labor Act's prohibition of strikes over minor disputes might as well not exist whenever a union official is willing to *assert* that he is motivated by safety concerns in calling a strike.

The harm that will befall the nation's railroads and the public they serve, if the decision below is not reversed, is substantial; and the distortion and partial repeal of the careful balance between labor and management embodied in the Railway Labor Act should not be countenanced in the absence of better reasons than those given by the Court of Appeals. Thus, while this case may present novel issues concerning the interplay of these two statutes, the effect of the decision below is too important to be left standing while other courts consider the questions—and while other unions strike in blatant violation of the commands of the Railway Labor Act.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Railway Labor Conference urges this Court to grant the Boston and Maine Corporation's petition for a writ of certiorari.

Respectfully submitted,

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